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IN THE

# Supreme Court of the United States

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No. ___

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BREEZEVALE LIMITED,

*Petitioner*,

v.

TIMOTHY L. DICKINSON, *et al.*

*Respondents*.

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**On Petition for Writ of Certiorari to the District of Columbia Court of Appeals**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Breezevale Limited respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

## OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 879 A.2d 957 (D.C. 2005) ("*Breezevale III*") (App. 1a to 22a). This opinion is preceded by two additional reported opinions of the District of Columbia Court of Appeals at 783 A.2d 573 (D.C. 2001) (en banc) ("*Breezevale II*") (App. 46a to 50a) and 759 A.2d 627 (D.C. 2000) ("*Breezevale I*") (App. 51 to 76a). The orders of the trial court are unreported. App. 23a to 45a; App. 77a to 125a.

## JURISDICTION

The opinion of the District of Columbia Court of Appeals was rendered on August 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## STATEMENT OF THE CASE

On October 7, 1994, Breezevale filed a complaint against partners of the law firm, Gibson, Dunn & Crutcher, LLP ("GDC") for legal malpractice in its representation of Breezevale against Firestone. GDC denied the allegations and filed a counterclaim for bad faith litigation asserting that key documents were forged in the underlying Firestone litigation and that Breezevale had brought its claim in bad faith.

On September 9, 1996, the court bifurcated GDC's counterclaim for bad faith litigation, ruling that it would be tried to the bench following the jury trial. The trial court, however, ruled that GDC could argue to the jury that Breezevale was proceeding in bad faith and committing fraud on the court and present its defense of forgery as excusing any malpractice committed by GDC. The trial court noted that, "if the jury finds in the plaintiff's favor on their [sic] main claims, I don't think there is much left to . . . pitch to the Court" on GDC's bad faith counterclaim. App. 130a.

At trial, Breezevale asserted that GDC, after learning in deposition preparation that an employee, Ms. Paul, would testify that she and another Breezevale employee falsified several documents related to Firestone: (i) did not inform Breezevale of the employee's allegations prior to the deposition; (ii) refused to delay the deposition even after being requested to do so by Breezevale; (iii) did not investigate the allegations prior to the deposition or prepare a defense to them; (iv) represented both the witness personally as well as Breezevale at that deposition; and (v) improperly advised a settlement of the Firestone litigation.

The jury found that GDC had committed malpractice during its representation of Breezevale in the underlying case. Answering the special verdict form, the jury found:

- "that [GDC] breached the standard of care";
- "that [GDC's] breach of the standard of care proximately caused damage to Breezevale's case against Firestone";
- that GDC "established [by the preponderance of the evidence] that forgeries occurred and . . . . that one or more Breezevale executives participated in such forgeries"; and
- "that Breezevale's forgery of documents [did not] play[] a substantial part in damaging its lawsuit against Firestone".

App. 158a-59a.

The jury further found that but for GDC's malpractice, Breezevale would have won on all of its claims against Firestone and awarded Breezevale $3,430,000.00. App. 160a.

On May 2, 1997, the court granted GDC's motion for judgment as a matter of law and in the alternative for a new trial. App. 91a-109a. The court ruled, *inter alia*, that: (i) it would *not* overturn the jury's finding that GDC had committed

malpractice, App. 95a-96a; (ii) because the jury found that documents were forged, the jury's finding of proximate cause must be set aside, App. 96a-99a; (iii) because the jury found that documents were forged, the jury's finding that such forgery did not substantially harm Breezevale's claims against Firestone must be set aside *even though* the court specifically provided for those results in its verdict form and instructions, App. 103a, 143a-44a, 154a, 159a, and; (iv) Breezevale's proof of damages was inadequate on each of its three claims against Firestone. App. 104a-08a.

Applying a clear and convincing standard of proof to the question of forgery, but without any evidentiary hearing, the trial court granted GDC's "equitable counterclaim" for "bad faith litigation" and found that Breezevale had filed its claim in bad faith. App. 110a-25a.[1] The trial court ordered Breezevale to pay GDC: (1) GDC's attorneys' fees[2] and costs for the malpractice litigation, totaling $4,061,353; (2) $1,000,000 in "punitive damages"; and (3) $295,280 in unpaid legal fees from the underlying Firestone litigation, despite the jury's finding and the court's acknowledgment that GDC had committed malpractice. App. 89a.

Appealing to the District of Columbia Court of Appeals, Breezevale asserted, *inter alia*, that the trial court violated Breezevale's First and Seventh Amendment rights and chal-

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[1] Breezevale first requested an evidentiary hearing on November 27, 1996. Pl. Breezevale Limited's Mem. of Pts. and Auth. With Respect to the Adjudication of Defs.' Counterclaims at 13 ("In order to resolve the foregoing issues a further evidentiary hearing is necessary."). On remand following *Breezevale I* and *II*, Breezevale again requested a hearing in its response to Defendants' Second Motion for Sanctions, arguing that one was required by the Due Process Clause. Plaintiff's Mem. of Pts. and Auth. in Opp. to Defendants' Second Renewed Mot. for Sanctions (Jan. 2, 2002) at 5 ("Due process mandates that Breezevale have an opportunity to defend itself . . . and an evidentiary hearing.").

[2] GDC represented itself and did not incur any outside counsel fees other than for expert witnesses.

lenged the trial court's grant of JMOL and judgment on GDC's counterclaims. The court of appeals reversed and vacated the trial court's judgment on all points except as to one of Breezevale's underlying claims against Firestone. App. 71a. GDC then sought en banc review, arguing *Hunter v. Wheate*, 53 App. D.C. 206, 289 F. 604 (D.C. Cir. 1923) justified the dismissal of Breezevale's claims against GDC and compelled the wholesale award of sanctions because Breezevale's claim was, according to GDC, founded upon forged documents. The court of appeals soundly rejected this argument, stating:

> We decline GDC's invitation that we now rule Breezevale to be barred as a matter of law from any recovery whatever against GDC. In all other respects, we leave the sanctions in the discretionary hands of the trial court upon remand.

App. 48a. The court of appeals found that Breezevale's case had merit and that jury's finding "confirmed" the "immateriality of the alleged forgeries". App. 49a n. 4.

> The jury reasonably could have found that an informed Breezevale might well have perceived the immateriality of the alleged forgeries to the strength of its case against Firestone—something the malpractice jury later confirmed . . . .

*Id.*

Following remand, and despite Breezevale's request for an evidentiary hearing, the trial court again found that Breezevale had filed and litigated its case in bad faith and that "'[b]y making it a major component of its malpractice suit against GDC, Breezevale perpetrated a fraud on the court'" thereby justifying dismissal of the action. App. 30a-33a, 43a. The trial court again awarded GDC all its legal fees of $4,061,353 and $1,000,000 in punitive damages but reversed its prior ruling on unpaid fees. App. 44a.

Breezevale again appealed to the District of Columbia Court of Appeals. Breezevale argued (1) the Seventh Amendment precluded the court's dismissal and sanctions and that the court was obligated to view the case in a way to uphold the jury verdict, not vitiate it;[3] (2) that due process entitled Breezevale to an evidentiary hearing, particularly because Breezevale had neither an incentive nor an adequate opportunity during the malpractice jury trial to present its defense to the charge of "bad faith litigation" based on the court's representation that it would be tried to the bench; (3) the trial court should have awarded only those attorneys' fees incurred as a result of the alleged forgeries, and the dismissal of the case and wholesale award of fees was unduly punitive and inappropriate; (4) the trial court's award of $1 million in "punitive damages" as a sanction was wholly inappropriate, as "punitive damages" cannot be awarded as a sanction pursuant to a court's inherent authority and in particular cannot be awarded where no underlying tort has been committed.

The court of appeals affirmed the ruling of the trial court with respect to the dismissal of the case, the award of attorney's fees and costs but reversed the separate award of punitive damages. App. 22a. The court of appeals affirmed the trial court's finding that the documents in the Firestone case were forgeries, that Breezevale's top executives knew it, and that Breezevale was not entitled to an evidentiary hearing. App. 6a-14a. Relying on *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28 (D.C. 1986), the court of appeals further

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[3] Breezevale argued that if the lower court were correct on the issue of forgery as determinative of bad faith, the trial court was barred by the Seventh Amendment from revisiting the issue because the jury assessed its impact on the case, found the issue of forgery immaterial and that Breezevale's claims had merit. Corrected Brief for Appellant (February 25, 2004) at 22-30. Breezevale further argued that the misconduct had to be material. *Id.* at 30. Breezevale also raised these objections in the trial court following remand. *See* Plaintiff's Mem. of Pts. and Auth. in Opp. to Defendants' Second Renewed Mot. for Sanctions (Jan. 2, 2002) at 13-18, 22.

found that all of GDC's attorneys' fees should be awarded notwithstanding the merit of Breezevale's claims, holding that fees can be "awarded from the point bad faith litigation tactics commence, even though some of those expenses would still have been incurred absent the bad faith conduct." App. 20a.

## REASONS FOR GRANTING THE PETITION

First, the District of Columbia Court of Appeals broke from settled law when it dismissed Breezevale's winning case against GDC and awarded GDC its fees based on the very same evidence the jury heard and considered when it found in favor of Breezevale and awarded it $3.4 million. The jury verdict demonstrated that the case had an objective basis and that the purported bad faith conduct was immaterial. The Seventh Amendment thus precludes the court's finding to the contrary. Second, if a court is going to levy any sanctions in such an instance, it cannot do so until it has afforded the parties an evidentiary hearing. There is a split among the circuits on this issue. Third, there is a split in the circuits with respect to the scope of a court's inherent power where the bad faith conduct is immaterial. Finally, the court's massive sanctions award consisting of the dismissal of Breezevale's successful $3.4 million jury award and additional award of all of defendants' attorneys' fees incurred in the underlying litigation violates the standards to be applied in assessing punitive awards and cannot stand.

### I. THIS COURT SHOULD RESOLVE WHETHER A COURT'S INHERENT POWER TO SANCTION CAN TRUMP THE SEVENTH AMENDMENT WHEN THE JURY HAS CONSIDERED AND REJECTED THE DEFENSES ON WHICH THE EXERCISE OF THE INHERENT POWER IS FOUNDED.

Once a jury has heard and considered the evidence of forgery and also decided the impact of that evidence on the

case, the trial court cannot then go back and reconsider the impact that this evidence should have upon the case in the guise of an exercise of its inherent power sanctions. To do so violates the Seventh Amendment.

The court of appeals' decision demonstrates amply the dangers in a court's unfettered use of the inherent powers. In this case, the jury heard evidence relating to GDC's defense of forgery but nonetheless decided the case in favor of Breezevale. As the District of Columbia Court of Appeals noted in *Breezevale II*, Breezevale won its malpractice claim before a "jury wholly informed of [Breezevale's] wrong-doing". App. 48a. Forgery was the mainstay of GDC's defense, not Breezevale's claim of malpractice. Indeed, the jury so found when it determined that GDC's malpractice was the proximate cause of Breezevale's injuries, that Breezevale was not contributorily negligent, and that the forgery of unidentified documents did not "play a substantial part in damaging [Breezevale's] lawsuit against Firestone" and awarded Breezevale $3.4 million. App. 159-60a. The trial court and thereafter the court of appeals, however, took one jury finding and exalted it above the rest. This decision is completely contrary to settled principles of constitutional law and cannot, simply because it is rendered in the context of an exercise of inherent power sanctions, be sustained.[4]

*Hiltgen v. Sumrall*, 47 F.3d 695 (5th Cir. 1995), directly rejects the approach followed by the *Breezevale* trial and appellate courts. In that automobile tort case, the court instructed the jury that one of the defense's three theories constituted negligence per se. The jury found that "'Hiltgen

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[4] The court in so doing transformed the jury verdict into one that was purely advisory. This the court may not do. *Indiana Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co., Inc.*, 195 F.3d 368, 374-75 (8th Cir. 1999)(A trial court cannot disregard a jury's verdict and substitute its own findings in deciding claims because it subsumes the jury's function and deprives litigants of their right to a jury trial).

was negligent in connection with the occurrence of this accident.'" *Id.* at 705. The jury, however, also found that the driver of the other vehicle was negligent and that his negligence was the proximate cause of the collision but that Hiltgen's negligence was not. The jury awarded Hiltgen $1.5 million. *Id.* at 699. The court of appeals held that *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S. Ct. 659 (1963), and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780 (1962) mandated that the case be viewed in a manner that makes the jury's answers consistent and upheld the verdict notwithstanding the jury's one apparently inconsistent finding. *Id.* at 701.

*Breezevale III*, however, followed the reasoning of the dissent in *Hiltgen*. The dissent opined that"[w]e are bound to view the evidence in the light most favorable to the jury's verdict. The jury found against Hiltgen on the negligence issue. We should, therefore, view the evidence in a light most favorable to the negligence finding and not in a light most favorable to Hiltgen, as the majority suggests." 47 F.3d at 708. The majority rejected this approach out of hand noting that this "would undermine the deferential standard for reviewing jury verdicts by allowing the appellate court to assume specific fact findings with regard to a particular special verdict even if those findings cause a direct conflict with another special verdict." 47 F.3d at 701 n. 7.

The fact that the *Breezevale* trial court used its inherent powers cannot justify a different result and Breezevale has been unable to locate any case, other than its own, so holding. *Cf. Pope v. Federal Express Corp.*, 974 F.2d 982 (8th Cir. 1992). The *Pope* court held that the Seventh Amendment did not apply because the plaintiff conceded that the document (which formed the basis for plaintiff's claim) had been manufactured and that "[t]herefore there is no jury issue." 974 F.2d at 984. Here, Breezevale disputed GDC's charge that the offer letters were "forged" and while the jury found some

documents had been forged by someone, the jury found they were of no import to the case. App. 159a; *see also* App. 49a n.4 ("The jury reasonably could have found that an informed Breezevale might well have perceived the immateriality of the alleged forgeries to the strength of its case against Firestone—something the malpractice jury later confirmed. . . .").

Once a case has been presented to the jury, the Seventh Amendment precludes the trial court's dismissal of a case pursuant to its inherent powers on a theory considered and rejected by the jury. The trial and later the appellate court, however, ignored the jury's other findings, all of which were in Breezevale's favor, and thus "undermine[d] the deferential standard for reviewing jury verdicts by allowing the appellate court to assume specific fact findings with regard to a particular special verdict even if those findings cause a direct conflict with another special verdict."[5] *Hiltgen*, 47 F.3d at 701 n.7.

In *Breezevale*, the jury specifically rejected the defense's claim of contributory negligence based on forgery as well as finding that it was GDC's malpractice that was the proximate cause of Breezevale's injuries, not the forgery of documents. The trial court simply cannot use its inherent powers to trump the Seventh Amendment. *Cf. Waggoner v. Mosti*, 792 F.2d 595, 597 (6th Cir. 1986) (trial and appellate court must "'reconcile the answers if possible under any view of the evidence in the case.'") (citation and internal quotations omitted)); *Jewell v. Holzer Hosp. Found., Inc.*, 899 F.2d 1507, 1510 (6th Cir. 1990) (under Rule 49(b) "even if the answers to jury interrogatories and the verdict do conflict, federal law favors

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[5] Post trial, GDC, asserted that "it was undisputed that these things were forgeries." The trial court summarily rejected that stating "it seems to me that that's the very question we asked the jury to decide. And I know that your position is that there were forgeries and that Breezevale executives participated in it and that of course was the thrust of your defense and your contributory negligence defense."

upholding the verdict if there exists some legal basis, supported by the evidence, upon which the verdict could be based.") (citing *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361, 77 S. Ct. 840, 841 (1957)).[6]

While the Supreme Court has not addressed the limitations of the court's inherent power to sanction in this context, the "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. 558, 565, 110 S. Ct. 1339, 1344-45 (1990) (citation omitted). The court simply cannot be permitted to use the guise of sanctions to vitiate a jury verdict where the basis for the sanctions was a disputed issue of fact and was considered and rejected by the jury when it rejected GDC's defense of contributory negligence and found that it was GDC's malpractice that was the proximate cause of Breezevale's injuries. *Cf. Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir.), *cert. denied*, 516 U.S. 867, 116 S. Ct. 184 (1995)("[t]he right to a jury trial . . . conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact. *This would be obvious if the second finder of fact were a judge.*") (emphasis added)). This, however, is exactly what happened in this case.

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[6] The court of appeals disingenuously accuses Breezevale of failing to undertake a pretrial investigation with respect to the authenticity of documents. App. 9a-10a. Breezevale in fact did do so and, in defense to GDC's claim of forgery, put on expert testimony supporting Breezevale's belief that the documents were genuine. Even the trial court noted that "there [was] evidence in the record" supporting Breezevale's claim that Paul was lying.

## II. THIS COURT SHOULD RESOLVE THE SPLIT IN CIRCUIT COURTS CONCERNING WHETHER A LITIGANT SUBJECT TO SIGNIFICANT SANCTIONS IS ENTITLED TO AN EVIDENTIARY HEARING.

This Court discussed the inherent power of courts to sanction misconduct in *Chambers v. NASCO*, 501 U.S. 32, 111 S. Ct. 2123 (1991). In particular, acting under their inherent power, courts may impose the "particularly severe sanction" of "outright dismissal of a lawsuit," as well as the "less severe sanction" of "an assessment of attorney's fees." *Id.* at 45, 111 S. Ct. at 2133. "Because of their very potency," this Court observed, "inherent powers must be exercised with restraint and discretion." *Id.* at 44, 111 S. Ct. at 2133. In particular, a court invoking its inherent power "must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Id.* at 50, 111 S. Ct. at 2136. Because the imposition of significant sanctions by a court implicates fundamental notions of due process, a litigant is entitled to "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2464 (1980).

Applying those standards, circuit courts are split concerning whether litigants subject to substantial sanctions are entitled to an evidentiary hearing. Indeed, several courts of appeals have, in various sanctions contexts, adopted the view that a litigant is not entitled to an evidentiary hearing and is only entitled to respond in writing. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164-65 (9th Cir. 2003) (holding district court did not abuse its discretion in imposing sanctions for discovery abuse without an evidentiary hearing, noting that "our holding accords with the general view of our sister circuits," and citing cases involving sanctions imposed under, *inter alia*, Rule 11 and inherent powers); *Cook v. American S.S. Co.*, 134 F.3d 771, 774 (6th Cir.

1998) (rejecting due process challenge to sanctions, and holding that "[i]t is apparent in this circuit, as well as others, that when imposing sanctions, a full evidentiary hearing is not required"); *Childs v. State Farm Mut. Auto Ins. Co.*, 29 F.3d 1018, 1027 (5th Cir. 1994) ("[s]imply giving the individual accused of a Rule 11 violation a chance to respond through the submission of a brief is usually all that due process requires"); *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) (due process required only "an opportunity to fully brief the issue. An oral or evidentiary hearing . . . is not required."); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1120 (1st Cir. 1989) (no right to evidentiary hearing on sanctions motion seeking dismissal and attorneys' fees).

Other courts, however, have recognized the right to a hearing where, as here, significant sanctions are to be imposed and no prior hearing directly addressing the alleged misconduct has been held. *See Lapidus v. Vann*, 112 F.3d 91, 96-97 (2d Cir. 1997) (reversing and remanding award of sanctions for a hearing, stating that the "issue of bad faith was not explicitly raised during that hearing, and Vann therefore was not sufficiently put on notice that this was his opportunity to defend himself against that charge."); *Rogal, D.D.S. v. Am. Broad. Cos., Inc.*, 74 F.3d 40 (3d Cir. 1996) (reversing imposition of inherent authority sanctions based on trial court's determination that plaintiff had committed perjury during jury trial because plaintiff had due process right to an evidentiary hearing, and specifically rejecting trial court's contention that jury trial itself had been adequate opportunity for plaintiff to be heard); *see also Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) (en banc) ("[W]hen a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of [an] additional hearing are likely to be greater."); GEORGENE M. VAIRO, RULE 11 SANCTIONS § 7.04 (3d ed. 2004) ("This component [the right

to be heard, either orally or in writing] of the due process rights of a person charged with a Rule 11 violation has been recognized by the courts, but the exact type of response or hearing that must be afforded has varied widely from circuit to circuit, and often from case to case . . . . [In particular, c]ourts have been split on whether bad-faith allegations necessitate an evidentiary hearing.").[7]

Indeed, some courts have gone a step further to hold that where the sanctions assessed pursuant to the court's inherent power are punitive and severe, the party is entitled to procedural protections appropriate to a criminal proceeding. The Ninth Circuit in *F.J. Hanshaw Enter., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128 (9th Cir. 2001) determined that a $500,000 sanction imposed through the court's equitable power for allegedly offering to bribe a receiver was criminal in nature, entitling the litigant to procedural protections, including a beyond a reasonable doubt standard of proof. 244 F.3d at 1139. Likewise, in *Mackler Prod., Inc. v. Cohen*, 146 F.3d 126 (2d Cir. 1998), the Second Circuit held that "the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case." 146 F.3d at 130. Further, a less severe sanction can be criminal in nature, and therefore worthy of criminal procedural protections, where it is punitive, rather than compensatory, based on past wrongful conduct rather than intended to force future compliance and when there is no opportunity to purge. *Mackler Prod., Inc. v. Cohen*, 225 F.3d 136, 142 (2d Cir. 2000). Given that the sanctions against Breezevale were not restricted to the bad faith conduct further demonstrates the need for a hearing.

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[7] Although the trial court allowed GDC to argue bad faith and fraud on the court to the jury, the trial court explicitly advised prior to the commencement of the jury trial that GDC's counterclaim for bad faith litigation would be tried to the bench following the jury trial.

This is in sharp contrast to cases such as *Childs, supra*, where the sanctioned party was not even entitled to an evidentiary hearing. Although the *Mackler* and *Hanshaw* cases relied upon this Court's holding in *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2252 (1994), they were not, like *Bagwell*, contempt proceedings for violation of a court order, but rather sanctions imposed for supposed litigation misconduct. This Court should determine whether such procedures, in fact, extend to punitive sanctions imposed pursuant to a court's inherent power.

In addition, the Third Circuit's holding in *Rogal* is directly at odds with the District of Columbia Court of Appeals on the particular issue *sub judice*. Dr. Rogal sued American Broadcasting Companies, Inc. ("ABC") and a reporter for defamation and false light invasion of privacy. After the jury returned a verdict for the defendants, ABC moved for sanctions, asserting, *inter alia*, that Dr. Rogal had "repeatedly given false testimony at trial." 74 F.3d at 42. Dr. Rogal's attorneys filed "a lengthy brief" in opposition to the motion and a reply memorandum. *Id.* Nevertheless, the district court, citing its inherent authority, granted the motion for sanctions, detailing ten separate subject areas in which it found that Dr. Rogal had testified falsely. *Id.* at 43.

The court rejected Dr. Rogal's request for an evidentiary hearing to explain his trial testimony. The court concluded that "[t]he actionable conduct took place in the presence of the court and is documented by the record," and that "[d]uring the trial, plaintiffs had every opportunity to explain and attempt to justify the numerous inconsistencies and contradictions" in Dr. Rogal's testimony. *Id.*

The Third Circuit reversed and remanded for an evidentiary hearing. "The imposition of monetary sanctions by a court implicates fundamental notions of due process and thus requires 'fair notice and an opportunity for a hearing on the record.'" *Id.* at 44 (quoting *Roadway Express*, 447 U.S. at

767, 100 S. Ct. at 2464). The court recognized that "the requirements of due process are not reducible to a static formula, but rather are sensitive to the facts and circumstances of a given case." *Id.* Nevertheless, the court rejected the trial court's conclusion that the jury trial itself presented Dr. Rogal with sufficient opportunity to be heard. *Id.* at 45. Specifically, the court concluded that Dr. Rogal "did not have the same incentive at trial to try to clear up all of the apparent contradictions and inconsistencies in his testimony or to try to show his good faith as he would have had at an evidentiary hearing on the question of sanctions." *Id.* Finally, the court noted the following:

> We recognize that the district court, in ruling on these requests, did not have the benefit of a precedent from our court specifically requiring a hearing under these circumstances, and in the absence of such a precedent we can understand why the court ruled as it did. We now hold, however, that under the circumstances of this case, an evidentiary hearing should be held to allay due process concerns.

*Id.* at 46.

Like Dr. Rogal, Breezevale is entitled to an evidentiary hearing. Though the jury found that documents had been forged,[8] it also found that Breezevale was not contributorily negligent and that the forgery had not played a "substantial part in damaging [Breezevale's] lawsuit against Firestone." App. 159a. Indeed, the trial judge himself noted that "[t]he irony is that Breezevale had a strong case for legal malpractice against GDC, regardless of how the forgery issue played out," and, with respect to GDC's claim for unpaid legal fees from the Firestone litigation, stated that "the value of GDC's representation was so diminished after the breach that it would be inequitable to make Breezevale pay for any part of

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[8] The jury's response did not specify *which* Breezevale executive(s) had actually forged the documents or had knowledge of the forgery. Nor did it identify which documents had been forged.

it." App. 28a, 38a. Nevertheless, after the jury returned its verdict for Breezevale and the court elected to impose sanctions for bad faith litigation, the judge refused to grant Breezevale an evidentiary hearing, which Breezevale specifically sought so that its principals, Messrs. Habib Bou Habib and Charles Awit, could present evidence of *their*[9] good faith belief in the genuineness of the allegedly forged documents. Instead, concluding that Breezevale's "request [for a hearing] does not bear scrutiny" and that "Breezevale [] had its bite [at] the apple" at trial, App. 25a, 26a, the trial judge ultimately imposed death knell sanctions on Breezevale. In its opinion affirming the trial court's imposition of sanctions, the court of appeals found that under its precedents "a full evidentiary hearing may not be necessary" in situations such as the one Breezevale was facing. App. 11a (quoting *Brady v. Fireman's Fund Ins. Cos.*, 484 A.2d 566, 569 (D.C. 1984)). It also agreed with the trial court that Breezevale had both the "incentive" and the "opportunity" to present its defense to the bad faith litigation claim before the jury. App. 13a.

This Court should grant certiorari in this case to finally and conclusively adopt the rule set forth by the Third Circuit in *Rogal* and to clarify the procedural protections to which litigants subject to "inherent power" sanctions for "bad faith" are entitled. *See* GEORGENE M. VAIRO, RULE 11 SANCTIONS § 7.04 (3d ed. 2004) (noting, in Rule 11 context, that "[c]ourts have been split on whether bad-faith allegations necessitate an evidentiary hearing," citing cases, and opining that cases denying hearings are "troubling" and that "the balance should be struck in favor of permitting an evidentiary hearing.").

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[9] It was Mr. Jaoude, a former Breezevale executive who was no longer associated with the company at the time of the malpractice action, who was most directly implicated in the alleged forgery. An evidentiary hearing would have allowed Mr. Habib and Mr. Awit to explain why *they* believed the allegedly forged documents were genuine, and consequently why their malpractice action against GDC was not brought or litigated in bad faith.

## III. THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER THE BAD FAITH CONDUCT MUST BE MATERIAL TO JUSTIFY THE DISMISSAL OF A CASE PURSUANT TO THE COURT'S INHERENT POWERS.

This Court has never addressed whether an exercise of inherent powers must be viewed in relation to the materiality of the offending conduct. *See Drobny v. Comm'r of Internal Revenue*, 113 F.3d 670, 679 n.15 (7th Cir. 1996), *cert. denied*, 522 U.S. 916, 118 S. Ct. 303 (1997)(observing that the Supreme Court's holding in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1944) "is somewhat unclear with regard to whether such a fraud must be *material* in order to justify setting aside a previous decision.") (emphasis in original). Indeed, the Court is not clear on that point. *See Hazel-Atlas*, 322 U.S. at 246-47, 64 S. Ct. at 1001-02 (stating that whether or not fabricated article "was the primary basis" for the circuit court's decision finding patent valid and infringed, "the article did impress the Court" as shown by the court's opinion quoting heavily from the article. Moreover, the litigant "thought the article material" because it urged the circuit court to rely upon it).

While the Fourth, Seventh, and the District of Columbia Circuit Courts of Appeals impose a requirement of materiality in the exercise of a court's power to dismiss a case for bad faith conduct or discovery violations, the Eighth and Ninth Circuits have rejected this criterion. This Court should resolve this conflict and set forth a clear requirement that bad faith conduct be material before the inherent power sanction of dismissal can be exercised. Such a restriction is necessary to preserve a party's fundamental constitutional rights, particularly given the lack of procedural safeguards in this area of the law.

The right to a jury trial is fundamental and the court's power to deny that right must be subject to rigorous review. Thus, in the context of Rule 37 sanctions, the Fourth Circuit has held that "when the sanction involved is judgment by default, the district court's 'range of discretion is more narrow' because the district court's desire to enforce its discovery orders is confronted head-on by the party's rights to a trial by jury and a fair day in court." *Mut. Fed. Sav. & Loan Assn. v. Richard & Assoc., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989) (citation omitted). "[T]hose competing interests require the application of a four part test", which includes "an inquiry into the materiality of the evidence" the litigant failed to produce. *See also Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503-04 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S. Ct. 744 (1978)(stating that the court's discretion in entering a default judgment represents "'an infringement upon a party's right to trial by jury under the seventh amendment' and runs counter to 'sound public policy of deciding cases on their merits,' and against depriving a party of his 'fair day in court'") (reversing trial court because documents trial court believed defendant was withholding were "immaterial to plaintiff's case.") 561 F.2d at 516.

The District of Columbia Circuit has applied this same standard. *See Webb v. D.C.*, 331 U.S. App. D.C. 23, 32, 146 F.3d 964, 973 (D.C. Cir. 1998)("It does not appear from the evidence before us that the absence of such documents is dispositive of [plaintiff's] case or why an adverse inference as to these documents would not have sufficed to address any harm resulting from their destruction.")(reversing entry of default judgment). Likewise, in *Assoc. of Am. Physicians and Surgeons, Inc. v. Clinton*, 337 U.S. App. D.C. 394, 187 F.3d 655 (D.C. Cir. 1999), the court of appeals reversed the trial court's award of attorneys' fees against the government for bad faith litigation. There, a presidential advisor filed a declaration the lower court found contained false statements. The court stated that "the representation, if false, was not material and there-

fore cannot be characterized as made in bad faith." 337 U.S. App. D.C. at 400, 187 F.3d at 661. The Seventh Circuit has also imposed the requirement that misconduct be material to the litigation. *Drobny*, 113 F.3d at 677-78 (stating that not all deceptive or improper conduct rises to the level of fraud on the court. Where the charge of misconduct is not related to the matter within the cognizance of the court, and is not material, courts have refused to find fraud on the court.).[10]

In contrast, the Ninth Circuit in *Dixon v. Comm'r of Internal Revenue*, 316 F.3d 1041 (9th Cir. 2003), held that the tax court erred in refusing to vacate a judgment for fraud on the court. The Ninth Circuit found that the tax court erred when it required that prejudice as a result of the misconduct be demonstrated before the sanction could be imposed.[11] Relying on *Hazel-Atlas*, the court held:

> Prejudice is not an element of fraud on the court. Fraud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced.

316 F.3d at 1046.[12]

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[10] *See also Allen v. Chicago Transit Auth.*, 317 F.3d 696, 703 (7th Cir. 2003) (even though witness may have committed perjury on a material point, dismissal is not necessarily mandated and is a circumstance to be weighed by the jury "rather than a ground for removing the issue of credibility from the jury by treating the witnesses's entire testimony as unworthy of belief.") (citations omitted); *Allen v. Tobacco Superstores, Inc.*, 375 F. Supp. 2d 796, 806 (E.D. Ark. 2005) (refusing to grant defendant judgment as a matter of law as a sanction for Allen's repeated perjury because Allen did not present false testimony or fail to disclose "matters material to the lawsuit.").

[11] Bad faith conduct cannot be prejudicial unless it is also material to the case. *See Mut. Fed. Sav. and Loan Ass'n*, 872 F.2d at 92 (requiring that the court consider "the amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of the evidence he failed to produce").

[12] The *Dixon* court recognized its ruling was contrary to the Seventh Circuit's decision in *Drobny*. *Id.* at 1046 n. 9.

Similarly, the Eighth Circuit in *Martin v. DaimlerChrysler Corp.*, 251 F.3d 691 (8th Cir. 2001) rejected the criterion that the bad faith conduct be material before a case could be dismissed.[13] Distinguishing *Shepherd v. Am. Broad. Cos.*, 314 U.S. App. D.C. 137, 62 F.3d 1469 (D.C. Cir. 1995), the court found that dismissal was an appropriate sanction within the inherent power of the court regardless of whether the plaintiff's bad acts went to the heart of her case. *Id.* at 694-95. Further, unlike the Seventh Circuit in *Drobny*, the court equated the plaintiff's non-disclosure to an abuse of the judicial process without a finding that the allegations were material to her claim. *Id.* at 695.[14]

In this case, although the jury expressly found that the documents were immaterial to Breezevale's claims of malpractice as well as Breezevale's underlying claim against Firestone, the court of appeals nonetheless upheld the trial court's use of the most drastic sanction power in its arsenal.[15] And, as set forth above, the judge cannot revisit this issue once the jury has decided it. As the en banc court noted, "[t]he acts of Breezevale here simply do not have the same degree of overall centrality to the damages, as illustrated by

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[13] This appears to be contrary, however, to the Eighth Circuit's opinion in *Hairston v. Alert Safety Light Products, Inc.*, 307 F.3d 717, 719 (8th Cir. 2002) ("Plaintiff's willful and bad faith conduct must also be the source of prejudice to the defendant.")(holding trial court exceeded its discretion in dismissing case).

[14] This appears to be consistent with Justice Scalia's view as reflected in *ABF Freight System, Inc. v. Nat'l Labor Relations Bd.*, 510 U.S. 317, 329, 114 S. Ct. 835, 842 (1994) ("The principle that a perjurer should not be rewarded with a judgment—even a judgment otherwise deserved—where there is discretion to deny it, has a long and sensible tradition in the common law.") Perjury, however, must be material.

[15] Even the concurrence in *Breezevale I* acknowledged, "GDC has not demonstrated that the award of damages to Breezevale was unreasonable, for the fabricated documents related solely to a single discrete part of the Firestone litigation, and the jury did not find them decisive even as to that part." App. 72a.

the significant verdict returned by a jury wholly informed of Breezevale's wrongdoing." App. 48a.

Where the bad faith conduct is immaterial, the exercise of a court's inherent powers must be tempered by the materiality of the offending conduct to the underlying case. The First Amendment right to petition further supports a requirement that the bad faith conduct be material.[16] An award of the sanction of dismissal based on an immaterial issue sets a dangerous precedent wherein a court's unbridled exercise of its inherent powers threatens to trump the First Amendment by eviscerating a litigant's objectively reasonable lawsuit. *See, e.g., BE & K Construction Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 122 S. Ct. 2390 (2002); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 113 S. Ct. 1920 (1993).[17]

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[16] Breezevale argued that the First Amendment precluded dismissal and sanctions before the trial and appellate courts in *Breezevale I, II.* Plaintiff's Mem. of Pts. and Auth. in Opp. to Defendants' Motion for Judgment Based on Their Defense that the Jury's Finding that Plaintiff Forged Documents Bars Plaintiff's Malpractice Claim as a Matter of Law (Dec. 20, 1996) at 12; Brief of Plaintiff-Appellant (Sept. 8, 1998) at 35; Brief of Plaintiff-Appellant on Rehearing *En Banc* (Feb. 20, 2001) at 31-32. Following remand and in its final appeal, Breezevale objected again and incorporated the decisions of *Breezevale I and II* as precluding dismissal for bad faith. Plaintiff's Mem. of Pts. and Auth. in Opp. to Defendants' Second Renewed Mot. for Sanctions (Jan. 2, 2002) at 13-15; Corrected Brief for Appellant (Feb. 25, 2004) at 18-20.

[17] The Ninth Circuit, however, in *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.), *cert. denied*, 534 U.S. 1066, 122 S. Ct. 667 (2001) appears to reject this standard stating that "sanctions . . . are justified 'when a party acts *for an improper purpose*—even if the act consists of making a truthful statement or a non-frivolous argument or objection.'" 255 F.3d at 1134 (emphasis in the original). The Second Circuit, however, has held that "[a]n award of sanctions under the court's inherent power requires *both* 'clear evidence that the challenged actions are *entirely without color*, and [are taken] for reasons of harassment or delay or for other improper purposes . . . .'" *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000)

Although this Court in *BE & K* qualified its opinion to preserve court-imposed sanctions such as those under Rule 11 of the Federal Rules of Civil Procedure or laws allowing for attorneys' fee awards, 536 U.S. at 537, 122 S. Ct. at 2404, those exceptions do not affect this Court's analysis when applied to a court's inherent powers or prohibition on post hoc evaluation of a litigant's case. It was only after the jury found in Breezevale's favor on every other issue did the court determine Breezevale's conduct was sanctionable. This is comparable to a plaintiff who brings a motor tort claim against a defendant asserting that the defendant both ran a red light and failed to reduce speed before rear ending him. The jury hears the evidence and determines that the light was green but that the defendant still failed to reduce speed. The jury returns a verdict in plaintiff's favor, only to have the court tell the plaintiff he must have lied about the light, dismiss his case and impose sanctions.[18] That a litigant with a meritorious claim can be punished for failing to prove every

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(alteration and emphasis in the original); *accord Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 190 (2d Cir. 2000).

[18] A party cannot be penalized simply for defending himself against an opponent's claims in court if he does not prevail. *See, e.g., United States v. Sales*, 725 F.2d 458, 460 (8th Cir. 1984)(stating that a court "may not use the sentencing process to punish a defendant, notwithstanding his guilt, for exercising his right to receive a full and fair trial."); *United States v. Derrick*, 519 F.2d 1, 3 (6th Cir 1975); *Attorney Grievance Comm'n of Maryland v. Monfried*, 368 Md. 373, 395, 794 A.2d 92, 105 (2002)(in an attorney discipline proceeding, the attorney's filing of exceptions to the trial court's findings could not be considered in imposing sanctions, particularly when the exceptions were "based on his version of the facts, which were rejected by the hearing judge."). That Breezevale lost on this one question cannot rise to the level of fraud on the court simply because the trial court believed Breezevale's executives to be liars in the face of an overwhelming jury verdict for Breezevale. *See Needle v. White, Mindel, Clarke and Hill*, 81 Md. App. 463, 474, 568 A.2d 856, 861 (1990) (holding that "where the underlying action presents a colorable claim, . . . Rule 1-341 sanctions are improper.").

fact supporting his claim can only have a chilling effect on the exercise of a litigant's constitutional rights.[19]

## IV. THIS COURT SHOULD FIND THAT LITIGANTS SUBJECT TO SUBSTANTIAL SANCTIONS ARE ENTITLED TO AN "EXACTING APPELLATE REVIEW" OF PUNITIVE SANCTION AWARDS.

In *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), this Court expressed concern "over the imprecise manner in which punitive damages systems are administered." *Id.* at 417, 123 S. Ct. at 1520. The Court had previously admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property . . . ." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 2340 (1994), and, accordingly, had instructed courts reviewing punitive damages to consider three guideposts: 1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S.

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[19] Other courts hold that it is inappropriate to punish prelitigation conduct. A contrary rule would be a "substantial abridgment of the American rule" such that a "'defendant found liable for fraud . . . would automatically be guilty of bad faith with respect to the underlying cause of action, thus abrogating the American Rule in all successful fraud actions. Such complete abrogation is not the purpose of the bad faith exception.'" *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10th Cir. 2000) (quoting 10 Moore's Federal Practice § 54.171[2][c][ii]) ("the clear majority view in federal courts is that the inherent power to award fees is limited to bad faith conduct in the litigation"). *See also Towerridge, Inc. v. T.A.O., Inc.* 111 F.3d 758 (10th Cir. 1997); *Lockwood v. Bowles*, 46 F.R.D. 625, 631 (D.D.C. 1969)(not all fraud constitutes fraud on the court, and neither does mere fraud *inter partes)*; *Outen v. Baltimore County*, 177 F.R.D. 346, 349 (D. Md.), *aff'd*, 164 F.3d 625 (4th Cir. 1998).

559, 575, 116 S. Ct. 1589, 1598 (1996). *State Farm* reiterated the importance of those guideposts, trumpeting this Court's belief "that unlimited jury discretion—*or unlimited judicial discretion for that matter*—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 1043 (1991) (emphasis added).

The sanctions imposed by courts on litigants or their attorneys are frequently either partly or entirely punitive in nature. This Court, for example, has unambiguously stated that "in the case of the bad-faith exception to the American Rule, the underlying rationale of 'fee shifting' is, of course, punitive." *Chambers*, 501 U.S. at 53, 111 S. Ct. at 2137. The particularly severe sanction of dismissal is likewise punitive in nature. *Shepherd v. Am. Broad. Cos., Inc.*, 314 U.S. App. D.C. 137, 146, 62 F.3d 1469, 1478 (D.C. Cir. 1995) (describing "inherent power" sanction of dismissal as "fundamentally penal"). Finally, there is no doubt as to the nature of a "punitive damages award" as an "inherent power" sanction in the few jurisdictions, in particular the District of Columbia, that apparently allow such a creature. Thus, in a very real sense, the trial judge in this case was engaging in precisely the same sort of indecipherable calculus as the jury in *State Farm*, and Breezevale was subject to the same due process concerns.

Given the punitive nature of sanctions awards, several courts of appeals have adopted certain guidelines above and beyond the general notion of reviewing for an "abuse of discretion." There is nearly universal agreement, for example, that, with respect to charges of bad faith litigation, the lower court should find bad faith by clear and convincing evidence. *See Shepherd*, 314 U.S. App. D.C. at 144-45, 62 F.3d at 1476-77 (holding that "fraudulent or bad-faith litigation misconduct," when punished pursuant to court's inherent sanction powers, must be proved by "clear and convincing evidence," and citing cases). Furthermore, several courts of

appeals have held that the lower court should explicitly state why lesser sanctions would not suffice. *See id.* at 147, 62 F.3d at 1479 (holding that "a district court may not rely on its inherent power to impose a sanction of either default or dismissal without explaining why lesser sanctions were likely to be ineffective" and vacating sanction imposed by district court for failing to make such a finding); *Halaco Eng'g Co. v. Costle,* 843 F.2d 376, 381 (9th Cir.1988) (holding that "[t]he district court must, before dismissing an action under its inherent powers, consider less drastic sanctions," and directing that on remand the district court should provide "a reasonable explanation of possible and meaningful alternatives.").

Furthermore, there seems to be a general consensus that awards of attorneys' fees should be limited to the bad faith conduct at issue. *See Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977) (holding that "in an action not itself brought in bad faith, an award of attorneys' fees should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves," and remanding because "[n]o attempt was made below to relate claimed expenses, costs, and fees to particular bad faith maneuvers"); *In re Ruben*, 825 F.2d 977, 990-91 (6th Cir. 1987), *cert. denied*, 485 U.S. 934, 108 S. Ct. 1108 (1988) (following *Browning* and vacating sanction of attorneys' fees because district court failed to limit them to additional expenses incurred due to relevant bad acts, and noting that "[c]areful analysis and discrete findings are required, no matter how exasperating the case."); *see also Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 390-91 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068, 124 S. Ct. 803 (2003) (noting that the "inherent authority of federal courts to punish misconduct before them is not a grant of authority to . . . undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute."). To allow sanctions in excess of those associated with the bad faith conduct is an award of punitive

damages on top of the sanction award. Finally, in reviewing "inherent power" sanctions, at least one court of appeals has explicitly stressed that, while the standard of review is technically that of abuse of discretion, courts of appeals should not fail to provide an exacting appellate review. *See Shepherd*, 314 U.S. App. D.C. at 143, 62 F.3d at 1475 ("Although we review a district court's use of its inherent power only for abuse of discretion, our review is not perfunctory.") (internal citation omitted).

The sanctions imposed in this case provide a particularly good illustration of the due process concerns at stake and of the need for more exacting appellate review of punitive sanctions. Breezevale was sanctioned by the same trial judge for the same conduct on two separate occasions. The first occasion took place after the jury returned a $3,430,000 verdict in Breezevale's favor. The trial court, citing insufficiency of the evidence, granted GDC judgment as a matter of law. It then turned to the issue of sanctions. The court concluded that Breezevale had known all along that certain documents in the case were forgeries, yet had persistently presented the documents as genuine. [20] For that conduct, the court punished Breezevale by ordering it to pay (1) all of

[20] Even though the trial court heard the evidence of the alleged forgeries throughout the trial, it did not stop the proceedings and declare that documents were forged before sending the case to the jury. Instead, it recognized that the existence of, and responsibility for, the alleged forgeries was a hotly disputed issued. Here, Breezevale's malpractice case was strong enough to warrant a jury verdict and to support the trial court's refusal to direct a verdict at the conclusion of the evidence. As the court held in *Needle*, 81 Md. App. 463, 568 A.2d 856, sanctions under this set of circumstances is inappropriate. "If the evidence was sufficiently debatable to deny the motions throug' out the trial, it was sufficient to justify [plaintiff] in bringing and continuing the case." *Id.* at 479-80, 568 A.2d at 846. Indeed, if a court can uphold sanctions against a party simply because the trial court disbelieved testimony sponsored by that party, virtually every civil case would result in sanctions being imposed. *See id.* at 478-79, 568 A.2d at 846.

GDC's costs and attorneys' fees for the malpractice action, totaling $4,061,353 and (2) $1 million as "punitive damages." App. 89a. The trial court considered awarding $8 million in punitive damages, which was the amount GDC requested, but rejected that amount because "[b]ased on what the Court learned at trial about Breezevale, it is inclined to think $8 million might put Breezevale out of business." App. 88a & n.8. The Court thus settled on "$1 million in punitive damages," an amount that "will hurt, but is not so great as to be beyond Breezevale's ability to pay." App. 89a.

The District of Columbia Court of Appeals, with a single exception, vacated the trial court's judgment and remanded. On remand, examining *precisely the same conduct*, the trial court decided to impose *significantly greater sanctions* on Breezevale and thereby dispose of the entire case. The trial court did this by reinstating exactly the same monetary sanctions it had imposed before (a total of $5,061,353) and, *in addition*, tacking on "the 'ultimate sanction' of dismissal of Breezevale's claim," a new sanction which, as the court of appeals itself observed, "consequently vacated a jury verdict of $3,430,000." App. 43a-44a, 21a-22a.

On the appeal now at issue, observing that "we find ourselves yet again addressing this dispute," the court of appeals vacated the separate $1 million punitive damages award as excessive but affirmed in all other respects. App. 22a. Having vacated a substantially smaller sanction on the first appeal, the court of appeals affirmed what amounted to a much larger sanction, even with the vacatur of the $1 million punitive damages component. As an initial matter, the court recognized that all of the sanctions imposed by the trial court "bore 'punitive' elements. First, the dismissal of Breezevale's claim consequently vacated a jury verdict of $3,430,000. Second, the awarding of attorneys' fees is an exception to the traditional 'American rule,' the underlying rationale [of which] is, of course, punitive." App. 21a-22a (internal quotations

and citation omitted). Furthermore, although the court vacated the separate $1 million "punitive damages" award, it specifically noted that "[t]o the extent that at least some of the attorneys' fees awarded may not have been directly incurred as a result of Breezevale's bad faith litigation tactics," these additional attorneys' fees "can fairly be treated as *permissible punitive damages*." App. 22a (emphasis added). In short, the court considered the combination of the wholesale imposition of attorneys' fees and the "ultimate sanction of dismissal" to "constitute significant punishment of Breezevale for its bad faith litigation tactics." App. 22a.

Although the court of appeals clearly expended some effort in its analysis of the sanctions imposed by the trial court, it ultimately failed to perform the "exacting appellate review" that due process requires for what the court of appeals itself acknowledged were significant "punitive" sanctions. Nowhere in the court of appeals' analysis is there any discussion of "the degree of reprehensibility" of Breezevale's alleged misconduct, which, since sanctions are indisputably personal, means a discussion of the misconduct of Habib and Awit.[21] *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. Nor is there any discussion of "the disparity between the harm or potential harm suffered by" GDC and the punitive sanctions imposed on Breezevale. *Id.*, 116 S. Ct. at 1598. Indeed, because the trial court failed to ever make any findings as to what proportion of GDC's costs and fees actually related to the alleged bad faith conduct, it was and remains impossible to get any sense of this critically significant ratio. The court of appeals also failed to require any explanation from the trial court of why a lesser sanction would not suffice. *See Shepherd*, 314 U.S. App. D.C. at 147, 62 F.3d at 1479 (holding that "a district court may not rely on its inherent power to impose a

[21] Because the trial court failed to provide an evidentiary hearing, any meaningful analysis of Habib's and Awit's conduct with respect to good or bad faith was effectively impossible.

sanction of either default or dismissal without explaining why lesser sanctions were likely to be ineffective" and vacating sanction imposed by district court for failing to make such a finding); *Halaco*, 843 F.2d at 381 (holding that "[t]he district court must, before dismissing an action under its inherent powers, consider less drastic sanctions," and directing that on remand the district court should provide "a reasonable explanation of possible and meaningful alternatives."). Indeed, with respect to what is perhaps the most arbitrary aspect of the trial court's punitive sanctions, the court of appeals failed to even inquire why the trial court imposed *two substantially different punitive sanctions awards for precisely the same conduct* on the two occasions it considered the issue. Instead, the court of appeals unquestioningly affirmed the harsher punishment.

As this Court has noted, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 2340 (1994). In the wake of *State Farm v. Campbell*, at least one court has already observed that "[f]ederal case law involving punitive damages is instructive with respect to . . . sanctions." *People v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 345 (Cal. Ct. App. 2004) (applying analysis set forth in *State Farm v. Campbell* and reversing trial court's imposition of $20 million sanction award against tobacco company). The Court should grant certiorari to clarify whether and to what extent due process requires an "exacting appellate review" of punitive sanctions akin to the type of review required for ordinary punitive damage awards.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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